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**In the
Supreme Court of the United States**
October Term, 1992

Ruth O. Shaw, *et al.*,
Appellants,
v.

Janet Reno, *et al.*,
Appellees.

**Appeal from the United States District Court
for the Eastern District of North Carolina
Raleigh Division**

STATE APPELLEES' SUPPLEMENTAL BRIEF

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STATE APPELLEES' SUPPLEMENTAL BRIEF

Six days after the state Appellees submitted their brief in this case, the Court decided *Voinovich v. Quilter*, __ U.S. __, 61 U.S.L.W. 4199 (March 2, 1993). In addition, *Grove v. Emison*, __ U.S. __, 61 U.S.L.W. 4163 (February 23, 1993), was not available in time to be included in the brief. Because these decisions address issues of direct relevance to the proper resolution of *Shaw v. Reno*, the state Appellees submit this supplemental brief discussing *Voinovich* and *Grove* pursuant to Sup. Ct. R. 25.5 (1991).

SUMMARY OF THE ARGUMENT

The Appellants' (hereafter "Plaintiffs") claim is that a state acts with discriminatory intent if it creates majority-minority congressional districts for the purpose of compliance with the

Voting Rights Act. The Plaintiffs thus seek a major revision of the traditional understanding that a state's intent is racially discriminatory only if the state made its decision at least in part because of the adverse effect the decision would have on a targeted racial group. *Voinovich v. Quilter*, however, applied the traditional view in rejecting a finding of discriminatory intent where the factual record showed race-consciousness but not invidious purpose on the part of the state actor.

Voinovich held that § 2 of the Voting Rights Act does not proscribe majority-minority districts unless they are shown to result in minority vote dilution. The decision thus forecloses the Plaintiffs' statutory argument that the Act should be construed to forbid race-conscious redistricting. After *Voinovich*, it is clear that the Plaintiffs' arguments necessarily attack the constitutionality of §§ 2 and 5 of the Act. *Voinovich* and *Grove v. Emison*, furthermore, reaffirmed the responsibility of state legislatures for congressional redistricting; the logical implication of the decisions is that the North Carolina plan under challenge in this case is constitutional.

ARGUMENT

I. *VOINOVICH v. QUILTER* APPLIED THE TRADITIONAL DOCTRINE OF DISCRIMINATORY INTENT:

The heart of the Plaintiffs' constitutional claim is their contention that North Carolina's deliberate creation of two majority-minority congressional districts in order to comply with the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, should be treated as intentional racial discrimination. See Amendment to Comp. ¶ 36(A), J.S. App. at 101a-04a. *Voinovich v. Quilter*, __ U.S. __, 61 U.S.L.W. 4199 (March 2, 1993), did not directly answer the

question of whether a "State's conscious use of race by itself violates the Fifteenth Amendment," *id.* at 4203, or the Equal Protection Clause, *id.* at 4202.¹ The decision, however, clearly demonstrates the Court's continued adherence to the traditional requirement that plaintiffs bringing race-based constitutional claims must be able to allege the existence of an invidious discriminatory purpose directed against a particular racial group.²

The plaintiffs in *Voinovich* claimed that the Ohio state apportionment board violated the Fourteenth and Fifteenth Amendments and § 2 of the Voting Rights Act, 42 U.S.C. § 1973, in redrawing Ohio's state legislative districts in 1991. According to the plaintiffs, the board "'packed' black voters by creating districts in which they would constitute a disproportionately large majority;" the board thereby allegedly "minimized the total number of districts in which black voters could select their candidate of choice." *Id.* at 4200. The board's stated purpose of compliance with the Act was, the plaintiffs asserted, a pretext concealing the deliberate dilution of African-American voting strength. The district court agreed, finding that the board had intentionally

¹ The Plaintiffs base their claim against the State on both the Equal Protection Clause and the Fifteenth Amendment. As the Court observed in *Voinovich v. Quilter*, the applicability of the Fifteenth Amendment to vote-dilution claims stemming from legislative reapportionments has not been determined. 61 U.S.L.W. at 4202 (March 2, 1993). The possible differences between the scope of the two Amendments, however, are not relevant in this appeal: it is settled law under both that a plaintiff must allege discriminatory intent in order to state a claim. Compare *Voinovich*, *id.* (Fifteenth Amendment) with *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment). The Plaintiffs' claim fails because they have not alleged that North Carolina acted with invidious discriminatory intent as this Court's decisions, including *Voinovich*, employ that concept.

² See *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (viable race-based equal protection claim must allege that state acted "because of" adverse effect on an identifiable group).

discriminated against black voters in violation of the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992).

On appeal, this Court reversed the lower court's constitutional holding because its finding of discriminatory intent was clearly erroneous. 61 U.S.L.W. at 4202. The reasons the Court gave for rejecting the finding show that the Court applied the traditional concept of invidious discriminatory intent.³ The Court observed that nothing in the record indicated that the draftsman of the redistricting plan had pursued a "discriminatory strategy" of "diluting minority voting strength." *Id.* at 4203. The fact that the draftsman disregarded state law requirements and purposefully created majority-minority districts where he believed compliance with the Voting Rights Act required him to do so "does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution." *Id.* The Ohio reapportionment board's reliance on suggestions by "sources that were wholly unlikely to engage in or tolerate intentional discrimination against black voters" such as the Ohio NAACP "directly contradicts the District Court's finding of discriminatory intent." *Id.*

This Court's decision to reject a factual finding entitled to deference under the clear-error standard of Fed. R. Civ. P. 52 evidences the Court's adherence to the principle that a constitutionally invidious intent necessarily involves the purposeful imposition of harm on a racial group as such. The record showed that the

³ "[D]iscriminatory purpose,' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. at 298, quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

state decisionmaker had acted race-consciously; it did not support the conclusion that the action was motivated in any way by a desire to impose "adverse effects" on any racial group. Indeed, the draftsman's intention of complying with the Voting Rights Act and the approval of the plan by "sources wholly unlikely to engage in . . . intentional discrimination against black voters" demonstrated that the purposes underlying it were legitimate rather than invidious.

The parallels between *Voinovich* and the present case are striking. North Carolina's purpose in creating two majority-minority districts, as described by the Plaintiffs themselves, was to conform to the Voting Rights Act as administered by the Attorney General, and thus to satisfy the State's constitutional obligation of "obedience to the Supremacy Clause." The legislature that approved North Carolina's present congressional districts was predominantly white; its white members assuredly were "wholly unlikely to engage in or tolerate intentional discrimination against" white voters. If the Plaintiffs' argument were correct that the mere fact that a state took race into account renders its intent invidious, the finding of discriminatory intent in *Voinovich* would have been upheld on appeal. The Court, however, reached the contrary result and did so on the basis of reasoning that started from the assumption that a state acts with "discriminatory intent" only when it chooses a course of action because of its adverse effects on a racial group. In the present case, this Court should adhere to the constitutional principles it applied in *Voinovich* and reject the Plaintiffs' claim.

II. THE PLAINTIFFS' CLAIM THAT THE STATE'S REDISTRICTING PLAN VIOLATES THE VOTING RIGHTS ACT IS FORECLOSED UNDER *VOINOVICH v. QUILTER*.

The Plaintiffs' statutory claim, in their amended complaint, is that the Voting Rights Act "does not authorize or permit a State legislature" to create majority-minority congressional districts. Amendment to Comp. ¶ 2(A), J.S. App. at 104a. *Voinovich v. Quilter* directly addressed and squarely rejected that view of the Act with respect to § 2, 42 U.S.C. § 1973. In *Voinovich*, the district court "held that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 61 U.S.L.W. at 4202. This Court disagreed.

Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect a candidate of its choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

*Id.*⁴ The Plaintiffs' statutory claim, which rests on their reading of § 2, *see* Comp. ¶ 24, J.S. App. at 85a-86a (citing 42 U.S.C. § 1973(b)), thus is foreclosed by *Voinovich*.

⁴ *See also id.* at 4202 (rejecting argument that state must prove existence of a § 2 violation before it can create majority-minority districts).

In light of the fact that this Court's § 5 decisions have consistently approved majority-minority redistricting as a means of satisfying the obligations of covered jurisdictions under that section, *see, e.g., Beer v. United States*, 425 U.S. 130 (1976),⁵ it is plain that Plaintiffs have no cause of action under the Voting Rights Act. As a matter of statutory construction, it now is clear that neither § 2 nor § 5 forbids race-conscious redistricting, and that in appropriate circumstances, either may require the creation of majority-minority districts.⁶ This is an unsurprising conclusion, but it highlights a crucial feature of this case: the Plaintiffs' constitutional claim necessarily impugns the validity of §§ 2 and 5 of the Act.⁷ Their argument thus questions not only the State's exercise of its "primary responsibility for apportionment of [its] federal congressional . . . districts," *Grove v. Emison*, __ U.S. __, 61 U.S.L.W. 4163, 4166 (February 23, 1993), but also Congress's power under the Reconstruction era amendments to

⁵ A covered jurisdiction's § 5 obligation to demonstrate that changes in its election laws "will not have an adverse impact on minority voters," *McCain v. Lybrand*, 465 U.S. 236, 247 (1984), necessarily requires a covered state to take the racial consequences of redistricting plans into account in adopting one. It is not without significance that the appellees in *Voinovich*, who unsuccessfully urged this Court to interpret § 2 to forbid the purposeful creation of majority-minority districts in the absence of a finding of minority vote dilution, conceded that the Voting Rights Act "authorizes and may compel the creation of majority-minority districts where Section 5 is at issue." Brief for Appellees, *Voinovich v. Quilter*, No. 91-1618, at 16.

⁶ Since a redistricting plan that had the unintended effect of diluting a protected group's voting strength would violate § 2, the *only* means a conscientious state legislature has of insuring that it redistricts in conformity with § 2 is to consider the effects of possible plans on minorities and, where necessary, to take race-conscious measures to avoid dilution of their voting strength.

⁷ The Plaintiffs have been understandably reluctant to emphasize the implications of their claims for the Voting Rights Act, but as amended their complaint explicitly asks that the Act be declared unconstitutional *pro tanto* "if [it] does permit or authorize a State legislature" purposefully to create majority-minority districts. Amendment to Comp. ¶ 2(A), J.S. App. at 105a.

"define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.). The Plaintiffs' attack on the constitutionality of key provisions of the Act contradicts Congress's considered judgment in the exercise of its powers as well as this Court's decisions upholding that judgment. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (sustaining the constitutionality of the Voting Rights Act as an exercise of Fifteenth Amendment power); *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980). As a matter of constitutional principle and precedent, the Court should reject the Plaintiffs' "invitation to overrule Congress's judgment that the [1982] extension [of the Act] was warranted." *City of Rome*, 446 U.S. at 180.

III. THE GROWE AND VOINOVICH DECISIONS REAFFIRM THE PRIMARY RESPONSIBILITY OF STATE LEGISLATURES FOR CONGRESSIONAL REDISTRICTING.

Both of this Court's most recent Voting Rights Act decisions emphasize the central role that the states are intended to play in congressional redistricting. *Grove v. Emison* held that a federal district court "erred in not deferring to the state court's timely consideration of congressional reapportionment." 61 U.S.L.W. at 4167.⁸ "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Id.* at 4166. Accord *Voinovich v. Quilter*, 61 U.S.L.W. at 4202.

⁸ The Court rejected as irrelevant under the particular facts of *Grove* that it was the state courts rather than the state legislature that would have reapportioned the state's congressional and legislative seats. 61 U.S.L.W. at 4166.

Shaw v. Reno presents even less reason for federal court intervention into the "highly political task" of redistricting, *Grove*, 61 U.S.L.W. at 4165, than did the facts of *Grove* or *Voinovich*. North Carolina, unlike the states involved in those cases, is in effect a covered jurisdiction under § 5 of the Voting Rights Act. It thus has a statutory duty to demonstrate that changes in its congressional districts are free both of invidious purpose toward and of discriminatory effects upon minority voters. A state obviously may not exercise its redistricting powers or attempt to obey federal statutes by means that affirmatively violate federal constitutional prohibitions. In enacting the plan challenged in this case, however, North Carolina carried out its "primary responsibility" for redistricting by means conforming to federal law, means which this Court has repeatedly approved in the context of § 5 and which Congress sanctioned in the enactment and amendment of the Voting Rights Act. In the absence of any allegation that the State's actual purpose was to harm any racial group, the Plaintiffs' race-based constitutional claim must fail.

CONCLUSION

The Court should affirm the judgment of the United States District Court for the Eastern District of North Carolina dismissing the Plaintiffs' complaint.

Respectfully submitted,

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